

No. 7:04-CR-00043-F-1  
No. 7:16-CV-00380-F

V.

ORDER

The Fourth Circuit Court of Appeals held that a conviction for North Carolina common law robbery does not categorically qualify as a violent felony under the Armed Career Criminal Act (“ACCA”).<sup>1</sup> See *Gardner*, 823 F.3d at 793. In *Gardner*, the Fourth Circuit Court of Appeals

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determined that North Carolina common law robbery does not fall under the “force” clause of ACCA, 18 U.S.C. § 924(e)(2)(B)(i), but under ACCA's residual clause, 18 U.S.C.

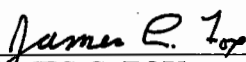
§ 924(e)(2)(B)(ii). *Id.* In *Johnson*, the Supreme Court invalidated the residual clause. 135 S. Ct. at 2551. The Supreme Court has held that *Johnson* applies retroactively on collateral review. *See Welch v. United States*, 136 S. Ct. 1257 (2016).

The Government concedes that Smith’s convictions for common law robbery are no longer violent felonies and he is no longer an armed career criminal under 18 U.S.C. § 924(e). Resp. [DE-61] at 3. The Government concludes that Smith’s sentence should be vacated, and he should be resentenced without the § 924(e) enhancement. *Id.* The Government concedes that Smith’s statutory maximum term of imprisonment for his pending revocation matter is twenty-four months. *Id.* at 3-4.

In light of the foregoing, including the Government’s concessions, Smith’s Motion to Vacate [DE-50] is ALLOWED. Smith’s August 2, 2004 Judgment [DE-9] of conviction and sentence hereby is VACATED, and he is to be promptly resentenced without the § 924(e) enhancement.<sup>2</sup>

SO ORDERED.

This, the 21 day of December, 2016

  
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JAMES C. FOX  
Senior United States District Judge

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a violent felony or a serious drug offense, or both, committed on occasions different from one another,” triggers an increased statutory minimum and maximum. 18 U.S.C. § 924(e)(1).

<sup>2</sup> Smith’s revocation of supervised release hearing is scheduled for this court’s February 13, 2017 term.